Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Sections of the	)	**MM Docket No. 92-266**
Cable Television Consumer Protection	)	
and Competition Act of 1992:	)	
Rate Regulation	)	
	)	
Leased Commercial Access	)	**CS Docket No. 96-60**

To: The Commission - **Mail Stop 1170**

REPLY COMMENTS OF THE COMMUNITY BROADCASTERS ASSOCIATION

Introduction and Summary

1. These Reply Comments are filed on behalf of the Community Broadcasters Association ("CBA") in response to the Commission's *Further Notice of Proposed Rule Making* ("FNPRM") in the above-captioned proceeding, FCC 96-122, released March 29, 1996. As indicated in its initial comments in this proceeding, CBA is the trade association of the nation's low power television ("LPTV") stations and has participated actively in prior phases of this proceeding, urging the Commission to adopt rules that will result in reasonable prices for leased access and lead to the development of a viable leased access market.

2. Both the cable industry and programmers currently carried on cable systems have predictably rallied against the Commission's proposed leased access rules. Entities that oppose the proposed rules appear to have three primary concerns: (a) that the proposed rules will result in decreased diversity of programming on cable and decreased competition among programmers;

(b) that existing cable programmers will be unfairly "bumped" and replaced by programming of significantly lesser quality; and (c) that the possible disruption that will be caused by the change in the rules is more important than the statutory mandate to provide access to channels designated for leased access at reasonable rates. However, in reality, none of these concerns is justified. Diversity and competition will actually *increase* upon implementation of the proposed rules, as leased access channels will finally become available to local programmers and smaller entities that are unable to pay the unreasonable lease rates allowed under the current rules. Moreover, local programming originated by LPTV operators is often of high quality and is programming that Congress, in the Cable Act of 1992, encouraged cable operators to carry but which remains uncarried on many cable systems. Adoption of the proposed rules would provide overdue relief for these programmers. Furthermore, the possible "disruption" that would be caused by the proposed rules is not sufficient justification for the Commission to ignore the Congressional mandate that leased access rates be reasonable. The Commission has no choice but to act in this proceeding to implement the stated intent of Congress; thus, new rules should be adopted, incorporating suggestions made by CBA in its initial comments.

Increased Diversity and Competition

3. Numerous entities have expressed great concern with regard to what they deem an inevitable decrease in diversity of programming that will result from implementation of the

proposed rules.[1/] Others do not see the point of adopting new rules to promote diversity when, they assert, it already exists.[2/]

4. These concerns are unfounded and defy the logical effect of the proposed rules. Because the proposed rules, if properly structured, will finally allow smaller independent programmers which originate quality local community programming the opportunity to gain access to cable and its subscribers, the effect will be *increased*, not decreased, diversity.[3/] Furthermore, even though the number of programming sources has increased somewhat over the last several years, diversity of programming cannot fully exist in a nation in which well over 60% of the households subscribe to cable without reasonable access by all potential programmers to the cable.[4/] CBA acknowledges that channel capacity to many cable systems is limited and does not propose that all programmers be guaranteed access to cable systems without compensating the operators for their reasonable costs for providing that access. However, the Commission has been directed by Congress to implement rules which ensure that the leased access rates are in fact reasonable, so that both large and small programmers alike may have access to the vast numbers of households which now subscribe to cable. It must act in this proceeding to fulfill that mandate.

1/ Encore Media Corporation Comments at 1; Faith and Values Channel Comments at 4; TCI, Inc. Comments at 6; A&E Television Networks *et al.* Comments at 27.

2/ Viacom Comments at 7; Lifetime Comments at 9; Outdoor Life Network et al. Comments at 12.

3/ It is important to note that many of the program-producer commenters have ownership ties with cable operators. An important objective of Congress in establishing leased access was to separate editorial control over some channels from cable operators.

4/ Moreover, there is no record regarding how many recent new sources are not vertically integrated with cable owners. *See* fn. 3 *supra*.

5. Other commenters argue that competition will decrease as a result of the proposed rules.[5/] The concern seems to be that because leased access programmers will be able to obtain lower rates than currently available, existing and potential non-leasing programmers will not be able to compete adequately with leased access service providers for cable system capacity and subscriber viewing.[6/] This conclusion, however, is completely at odds with the logical effect of the proposed rules and misses the point. Under the new rules, if demand for channel space exceeds capacity, the pool of potential programmers, which can include the programmer who was bumped, bid to determine which one will occupy the channel designated for leased access. As a result, the rates charged for the leased channel become whatever the market will bear --- which is the essence of true marketplace competition. Existing programmers can bid on channel space as easily as any other potential leased access programmer and thus are not wrongfully disadvantaged by the proposed rules.[7/]

Programming Options

6. By far, it appears that the concern expressed the most thus far in this proceeding is with regard to the "bumping" of existing programmers to make room on cable systems for leased access programmers. For example, Encore Media submits that adoption of the proposed rules would have the "*unintended* consequence of requiring *widespread* deletion of existing

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5/ Encore Media at 1; International Cable Channel Partnership Ltd. Comments at 1.

6/ International Cable at 1.

7/ CBA has not opposed the Commission's proposal to allow leased access rates to migrate to what the market will bear if the demand for leased channels exceeds the supply.

programming services."[8/] Several commenters argue that the proposed rules will displace "quality programming" solely in favor of home shopping programmers and providers of infomercials, because only those programmers could possibly afford to pay for carriage on a cable system.[9/] However, it is for precisely that reason --- economic barriers to leasing created by the current rules --- that the Commission initiated the present proceeding. As noted above, greater diversity will result from implementation of the proposed rules; therefore, current programming will be replaced, if at all, by other, more diverse programming. There is no evidence that such programming will be of lower quality. LPTV broadcasters produce large amounts of high quality local and regional television programming not available elsewhere; many are ready, willing and able to pay a reasonable price to lease a cable channel where they have no must-carry rights, because many are in heavily cabled markets and will not survive without such carriage. There is no other way for these stations to get their programming to the great majority of viewers who subscribe to cable.[10/]

7. Certain commenters argue that LPTV broadcasters should not be allowed to lease channels on cable because those broadcasters are already protected by the must-carry provisions

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8/ Encore Media at 1 (emphasis added). The result in not "unintended." *See* par. 4 and fn. 3 *supra*.

9/ Outdoor Life Channel at 17; Adelphia Communications Corporation et al. Comments at 2; Outdoor Life Network at 22.

10/ Off-air reception of local broadcasting signals is becoming increasingly more difficult, if not impossible in some areas, where local zoning codes prohibit homeowners from erecting television antennas. Erwin Scala Broadcasting Corporation Comments at 4. In these areas, broadcasters that cannot obtain carriage on area cable systems will not survive because they have no access to viewers.

of the Cable Act.[11/] What these comments fail to recognize, however, is that LPTV stations have in actuality very limited must-carry rights under Section 614 of the Communications Act; for example, they have must-carry rights only if the station is not located in one of the top 160 MSAs and only if there is no full power station in the market. Thus, for the majority of LPTV stations, must-carry is not an option for carriage on area cable systems. Leased access, however, is often a very plausible option as long as the rates are reasonable.[12/]

8. Instead of implementing new rules as proposed, TCI urges the Commission to "clarify cable operators' right to negotiate below the maximum [leased access] rate" and to encourage such behavior, based on the potential lessor's programming (*i.e.*, encourage cable operators to carry local programming at lower lease rates). While this approach may sound appealing because it requires little or no substantive regulatory action by the Commission, experience has shown that cable operators that are not required by law to allow LPTV stations to occupy space on their systems at a reasonable rate are not likely to provide such carriage on their own. In fact, many CBA members believe that the unreasonably high lease rates that they have been quoted for carriage on certain cable systems around the country are usually intended to keep the LPTV operator off the system, not to encourage local programming. One reason for this behavior is based on simple economics. Motivated by the competition between the cable system and the LPTV operator for local advertising dollars, the cable system can put the LPTV station

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11/ Outdoor Life Channel at n. 13; USA Networks' Comments at 2; *see also* Outdoor Life Network at 35-36.

12/ CBA has no objection to a rule that bars a broadcaster from leasing cable capacity for programming that has must-carry rights.

at a severe economic disadvantage by effectively denying carriage on its bottleneck access system to television receivers and thus reducing the viewership of the station. If not legally compelled to give reasonable access to the cable system to all programmers, including LPTV operators, cable systems will have little or no economic motivation to do so.

Disruption of the *Status Quo*

9. In attempting to defeat the proposed rules, several commenters rely on the Commission's desire to maintain the *status quo* to the extent possible. These commenters argue that it is unfair to adopt new rules at the expense of programmers that have emerged in reliance on the existing leased access regulatory framework.[13/] However, as stated in CBA's initial comments, concern that the current programmers be protected is unfounded and largely irrelevant. If in fact contracts and other arrangements have been negotiated "in reliance on the current regulatory framework," the negotiators knew the cable operators' responsibilities regarding leased access and chose to enter into carriage agreements anyway. The Commission should not now have to protect those negotiators who imprudently assumed that the statutorily mandated leased access channels would never be used as the law requires. Such an irrational conclusion should not be rewarded now by protecting those cable operators and programmers that made their arrangements at their own risk. The Commission is obligated by statute to ensure reasonable rates are charged for leased access channels. It does not have the discretion to neglect this responsibility because of sympathy for cable operators and programmers who have operated on the assumption that the law regarding leased access would not be used or enforced.

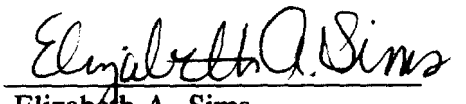
13/ Outdoor Life Channel at 2; *see also* ESPN, Inc. at 1; Continental Cablevision Comments at 20; Lifetime at 3; Discovery Communications, Inc. Comments at 14.

Conclusion

10. In the proposed rules, the Commission has produced the beginnings of a set of workable standards under which the original intent of Congress in mandating leased access may be finally implemented. Because the proposed rules will increase diversity and competition and will promote the carriage of quality local programming, the rules should be adopted and enforced immediately, subject to points made in CBA's initial comments, despite the intense pressure from the cable industry and existing programmers to do otherwise.[14/]

Respectfully submitted,

Peter Tannenwald



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14/ CBA continues to urge that the Commission simplify the proposed rules and consider a benchmark rate that would be presumptively reasonable.